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**Norms and Legal Normativity**

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# Legal philosophy as practical philosophy

Jesús Vega

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## 1 Introduction

- 1 Anyone grappling with the problem of the status and justification of the “Philosophy of Law” as a philosophical discipline has to address a series of extraordinarily intricate problems. The first problem is that of explaining why the institutionalisation of the discipline is so characteristically *modern*: did Hugo’s *Philosophie des positiven Rechts* (1798), Austin’s *Philosophy of Positive Law* (1861) and Hegel’s *Philosophie des Rechts* (1821) truly herald a new discipline or simply a new name for a kind of philosophical reflection that was already ancient and traditional? This problem depends on one’s philosophical stance on natural law.
- 2 The second problem relates the historical and thematic bifurcations characteristic of our discipline: first, the bifurcation stemming from the opposition between “jurists’ legal philosophy” and “philosophers’ legal philosophy” (Bobbio 1990) and, secondly, the bifurcation resulting from the opposition between “philosophy of law” versus “theory of law”. This problem depends on one’s philosophical stance on legal positivism.
- 3 In this paper, I plan to focus primarily on the second problem. My purpose is to make a case for the strictly philosophical nature of our discipline. This means that I must first take a prior stance on the issue of what philosophy is in general, outline the minimal premises for the definition of philosophical rationality and establish a meta-theoretical classification of the genres of philosophical discourse (Sec. 2). This will then lead me to undertake a critical examination of Bobbio’s dichotomy between jurists’ legal philosophy and philosophers’ legal philosophy (Sec. 3). Thirdly, it is essential to tackle the thorny issue of reformulating the existing relationships between legal philosophy as a “special”, “sectorial”, “applied” or “regional” discipline as opposed to a “general” (or “pure”, “fundamental”, “essential”, etc.) philosophy. Here we find a convergence between the generic problem of what the “parts” of philosophy are, in the general sense of the

discipline (logic, epistemology, ethics, anthropology, natural philosophy, etc., even though they themselves are also often seen as “special” philosophies) and the specific problem posed by a philosophical discipline which is, furthermore, explicitly “centred” around a particular institution associated with concepts of its own, as is the law (in this it is comparable to other “philosophies of”: philosophy of religion, philosophy of art, philosophy of history, etc.). I shall re-examine this problem using the distinction between *concepts* of law and *ideas* of law (Sec. 4). Fourthly, I shall defend the thesis that, when ascertaining the type of philosophy the philosophy of law is —or should be—, the most decisive factor is not so much (or not only) the relationship between philosophy of law and philosophy in general as, more importantly, the relationship between it and law itself (Sec. 5). I argue that the nature of law itself makes its practice inevitably and ineluctably associated with philosophical ideas and conceptions. This practical view of law is tightly bound with a view of legal philosophy as a practical philosophy, and this is the main thesis I shall defend here. Different expressions of this practical view of law can be found in prominent contemporary authors who go beyond the dichotomy of legal positivism–natural law (such as Nino, Alexy, Dworkin, Atienza). The essential feature which I regard ties philosophy of law to the condition of some “practical philosophy” is the role played by the concept of value, i.e. the centrality and pre-eminence of its evaluative dimension. The fundamental ideas of the philosophy of law are thus *values*, in the sense of *practical ideas* (Sec. 6). Hence, legal philosophical discourse has to remain close to the practice of law and is necessary for it. What gives legal philosophy a special place (even a kind of “pre-eminence”) within the general realm of practical philosophy is its privileged perspective on practical fundamental values (that is, moral and political values), due to its proximity to the practice of law, which is the institution whose mission is precisely to reconcile conflict and restore the unity of these values in justifiable and argumentative terms. This approach allows us to go beyond the dichotomy between natural law (that claims that values constitute the ultimate underpinning of law, but in the sense of a dogmatic or metaphysical philosophy) and legal positivism (defined by evaluative distance and neutrality regarding law, but in a sceptical or relativistic sense, postulated more as a scientific than as a strictly philosophical discourse of law).

## 2 A general conception of philosophy

- 4 I will adopt the view of the philosophy of law as the “rational and critical totalisation of the phenomenon of law”, as suggested by Manuel Atienza.<sup>1</sup> The key to this conception (which was inspired by the Spanish philosopher Gustavo Bueno)<sup>2</sup> lies in the distinction between *concepts* and *ideas*. Concepts are inherent to the sciences (in a broad sense, including technical fields), while ideas are the very stuff of philosophy. Both —scientific concepts and philosophical ideas— are “critical totalisations” (“criticism” is not exclusive to philosophy) and both encompass universality. However, the totalisation and universality of ideas is not the same as, and cannot be reduced to the totalisation of concepts. Philosophical problems abide by their own format: they are neither technical nor scientific problems, but rather emerge directly or spring up at the same time as technical or scientific problems, representing a second degree of reflexivity. Philosophy is not an original or “first-degree” body of knowledge. It is independently justified as a unique, substantive body of knowledge and cannot be reduced either to simple “adjectival” knowledge, doomed to be “liquidated” by the sciences; or “genitive”

knowledge, confined to a simple logical analysis or encyclopaedic synthesis in relation to scientific knowledge. Nor, obviously, can it be reduced to some kind of “dogmatic” or “metaphysical” knowledge, disconnected from the sciences.

- 5 Without question, the sciences are the most universal exponent of knowledge at our disposal. However, theirs is a universality that is restricted or bound to certain conceptual domains (or “universes of discourse”) which are more or less closed according to objective theories and laws. Following a traditional nomenclature, Bueno called these domains “categories”: the physical, chemical, mathematical, anthropological, sociological, psychological and other categories. Scientific concepts (including techniques and technologies) would be universal relative to or within each of these categorical domains, filtering out everything that is conceptually irrelevant, or *external* to them. However, for this very reason, everything that can be said rationally about each category individually or about all of them together (i.e., on the conceptualisation of the world) would not be *exhausted*. Thus, at the very least, questions such as the relationships between these diverse categories (how many sciences there are and how they differ among each other), their scope (how far the universality of each science stretches) and their validity (what it means to consider a given scientific knowledge universally grounded) could no longer be resolved from inside the categories themselves, as they do not constitute scientific or technical problems to be analysed using their own conceptual instruments. On the contrary, they require a different kind of rational treatment, a totalisation of a different type, one that is also universalist. And this, precisely, is what philosophical discourse is. There would then be another genre of “second-tier” concepts, the universality of which cross-cuts and cannot be reduced to the categorical concepts. These are *transcendental* concepts in that they “transcend” each of the categories, but not all of them as a whole (just like the three classical ideas of traditional metaphysics laid out by Kant in his first *Critique*).<sup>3</sup> These concepts could actually be called philosophical *ideas*, once again following a tradition that begins with Plato and reaches down to Kant and Hegel, although this does not mean that we are required to adhere to the traditional idealist conception of metaphysics. Ideas are neither separated forms, nor *a priori* units of knowledge, nor figures of an unfolding Spirit; rather, they can be viewed as ideas in an historical-cultural sense, bearing in mind that although associated with “ideologies” in the Marxist sense, they cannot be understood merely as ideological-conjunctural contents either. Philosophical theories are therefore nothing other than more or less systematic elaborations and interpretations of these ideas throughout their historical development. They thus reflect problems which have been sparked repeatedly by the concepts of the sciences, yet they resist being equated with or reduced to mere scientific or technical problems. As they involve ideas and not only concepts, philosophical problems truly have their own format. They are not *resolved* by the sciences or techniques but instead *reframed* by them (hence their historical persistence). A philosophical problem is characterised primarily by the fact that it questions an entire category as a whole, and does so in a particular way, connecting it to others and inquiring into its foundations and validity. This is what happens, for example, with *epistemological* and *ontological* questions, which question how categories represent or conceptualise the world and how the world is represented or conceptualised by them. The answer to this requires a kind of totalising reflection which encompasses *criticism* —that is analysis, comparison, classification, setting limits— of the scientific concepts themselves according to more or less systematic general conceptions which deal with epistemological ideas (a certain

theory of science or of knowledge) and ontological ideas (a certain theory of the elements which make up the real).

- 6 So how does this “critical totalisation” translate in relation to law when defining legal philosophy? Firstly, we have to specify the meaning of this notion of “totalisation”, and then we must be able to give precise meaning to the cliché of the “critical” nature of the philosophy of law.
- 7 Regarding the former, Atienza specifically associates the meaning of this totalisation with the *transcendental* and *inter-categorical* nature of legal philosophy. Thus, he maintains that “the essential function of philosophers of law should be that of acting as ‘intermediaries’ between legal knowledge and practices on the one hand and all other social practices and knowledge – including philosophy – on the other”, and that “its place lies precisely in the frictions and vacuums produced by their functioning and interaction. Therefore, legal philosophy may claim to be a *totalising* knowledge inasmuch as its points of departure and arrival are these other knowledges and practices (Atienza 2015: 5).
- 8 Regarding the latter, Atienza assumes that the critical dimension of legal philosophy stems from the fact that it adopts “a perspective that does not match that of those who are situated inside each of these parcels, as the philosopher of law can and should question the established frameworks, an approach forbidden to one who operates exclusively from inside a given science or technique (who, naturally, does not relinquish a critical approach but rather exercises it differently)” (Atienza 2015: 5).
- 9 Both features, as we can see, are largely similar. And both lead us to pose the same problem: how is it possible for the philosophy of law, which is “focused” on a single category, to be genuinely “philosophical”, that is, for it to be a totalising-critical (transcendental or cross-categorical) discourse? In other words, if what makes legal philosophy a unique and specific discourse is its “cross-categorical” or “transversal” nature in relation to the different conceptualisations of the phenomenon of law –both internal and external to the legal category– how can it still be a “regional” philosophy in the twofold sense of being a philosophy *distinct* from “general” philosophy while also being “local” or “particular” in nature (that is, associated with legal discourse, a discourse which is obviously used locally and particularly)? How could these two characteristics be made compatible: its “genitive” legal nature and its universal or philosophically “transcendental” nature?

### 3 Jurists’ legal philosophy and philosophers’ legal philosophy

- 10 This leads us to a related problem –famously posed by Bobbio– which is the controversial duality between jurists’ legal philosophy and philosophers’ legal philosophy. This problem stems from the *fact* that the tradition of Western philosophical thinking on law has historically occurred in a “bifurcated” fashion: by philosophers who come to law from their omni-comprehensive systems of ideas seeking to fit it into them, and by jurists who somehow draw from certain general philosophical frameworks to construct theories that are also omni-comprehensive, but whose scope primarily falls within the field of law, or which are essentially focused on reflecting and developing legal categories. We can easily illustrate this bifurcation by contrasting Aristotle and Cicero in the ancient world; Augustine and Gratian or Thomas Aquinas and Bartolus in the Middle

Ages; and “philosophers’ natural law” (Suárez, Leibniz) and “jurists’ natural law” (Grotius, Thomasius) in the modern period. Ever since philosophy of law emerged as a new discipline in the contemporary era —replacing natural law, which was, in fact, legal philosophy— it has been cultivated almost exclusively in law faculties instead of in philosophy faculties. That is, its main practitioners are jurists. This, coupled with academic specialisation, has increased the endogamous bias of legal philosophy (as well as the isolation of general philosophy from the “closed garden” of law, in Bobbio’s words). However, it is true that legal philosophers have continued to draw from general philosophies, both current and past (thus, Kelsen cannot be understood without Kant, Hart without Wittgenstein, Finnis without Thomas Aquinas, Alexy without Habermas, hermeneutics without Gadamer), which nonetheless are given a new and different dimension, driven by a reflexive interest in the law and in developments in legal practice (thus, Kelsen has said much more about legal duty than the neo-Kantians, and the same holds true of Hart compared to Wittgenstein on legal rules, and Alexy on the theory of legal discourse compared to Habermas). Therefore, the relationship between the two —“regional” legal philosophy and general philosophy— is a complex one. It is primarily couched in truly controversial terms because of the fact that, after the decline of natural law, the entrenchment of legal positivism as a core, dominant vein in contemporary legal thinking went hand-in-hand with a parallel tendency to liquidate the substantive aspect of philosophy (a feature it shares with both general 19<sup>th</sup>-century positivism and neo-positivism). This is yet another case of what Bueno (1970: 56) calls the “positivistic death” of philosophy. In this way, the philosophy of law claims to be a discourse “by and for jurists” instead of “by and for philosophers”: that is, a technical-practical discourse inherent to the category of law. Even the *nomen* “philosophy of law” is disappearing, dissolving into the more generic “theory of law”, the latter (in the continental tradition) meant as a discipline with primarily scientific<sup>4</sup> or doctrinal pretensions —a “high dogmatics” constructed in the mould of the positivistic *Allgemeine Rechtslehre*— or (in the Anglosaxon tradition) *jurisprudence*. That is to say, it is a legal-categorical rather than a “philosophical” discourse in both cases. Legal positivism, in Radbruch’s celebrated words, thus “euthanizes” philosophy of law in that the latter sees itself as “part” of a “previously given” philosophical system in the traditional style. It is not philosophy which determines the unity of ideas in a “top-down” reflection on the law, but rather categorical legal experience, inasmuch as it provides the materials for “bottom-up” building, as Bobbio claims.<sup>5</sup>

- 11 The preference for jurists’ philosophy of law is unquestionably backed by an extraordinarily powerful argument: the empirical reference to the legal category, to legal positivistic concepts and to the real practice of law. Legal philosophy should be a “philosophy of positive law” built upon the problems faced by contemporary states governed by the rule of law, along with their complex technical legal-administrative organisation or progressive constitutionalisation, as opposed to a speculative or unproductive reflection (metaphysical or dogmatic).<sup>6</sup> However, the issue is whether this proximity to legal categorical experience may not also act as an *obstacle* —and not necessarily an advantage— to constructing a truly philosophical-critical discourse around the law. That is, the question is whether self-understanding of the philosophy of law as a “jurists’ philosophy” cannot also lead it to become *ancilla iurisprudentiae*, in a reflection indistinguishable from that of legal specialisation, a mere professional propaedeutics, a philosophical patchwork or *bricolage* adjunct to jurisprudence,<sup>7</sup> in short, yet another part

of legal ideology in the broad (though not necessarily negative) sense. This situation could be compared, *mutatis mutandis*, to that which entails simply admitting that the philosophy of religion only makes sense when made by, and when serving, the adepts or theologians of a given denomination. This risk of “dogmatism” has not only been fostered by the discipline’s aforementioned specialisation and institutional location, but also largely by the methodology of legal positivism, in which the prioritisation of the doctrinal (or “internal”) point of view has led the concept of law to become insular and detached from other categories, both social-scientific and political-moral. The thesis of the separation between law and morality, the “purity” of the theory of law, the neutral descriptive or evaluative study of “what law is” instead of what it “ought to be”, and the consideration of all “external” perspectives as irrelevant to jurists, are well-known expressions of this methodology, which leads one to conclude that the philosophy of law must be alien to moral philosophy, political philosophy, social philosophy and the like. In other words, legal philosophical discourse is doomed to be relevant only to jurists rather than a subject of interest to “philosophers” or one about which they have anything interesting to say.

- 12 And this is the core point that I wish to discuss with regard to the need to rethink and redefine the status of the philosophy of law. Not just *any* discourse about law can genuinely be called philosophical, even if it bears this name, nor can *all* philosophical discourse about law be labelled dispensable or dogmatic as such. The contrast that Bobbio formulated is actually based on a false dilemma. The aprioristic dismissal of “philosophers’ philosophies of law” is gratuitous: it is not actually targeted against “philosophy” *itself* but against a *particular* philosophy whose assumptions or theses are deemed dogmatic, scholastic or metaphysical by another particular philosophy (in the case of Bobbio, from legal positivism).<sup>8</sup> Likewise, the preference for “jurists’ philosophy of law” can (and in my opinion, should) be accepted without this meaning embracing an insular or purely endo-legal approach. Legal philosophy can only be truly philosophical if it is critical in nature, and this means that it must be positive but not positivistic, associated with the concept of legal experience but not dogmatic, coextensive with practical legal discourse but not merely “genitive”. That is, it requires an inter-categorical perspective, a “totalisation” which results in making relevant connections between the legal category and other categories.<sup>9</sup> This is the path followed by the post-positivistic philosophy of law. But this totalisation can only occur in terms of ideas and theories that must necessarily be drawn from a general philosophical conception, and this means that *all* legal philosophy (including positivistic legal philosophy)<sup>10</sup> is the “application” of philosophemes. In consequence, to paraphrase Kant, it is not clear whether “the servant”, i.e., philosophers’ legal philosophy, “is the mistress’s torchbearer or train-bearer”.<sup>11</sup>
- 13 According to the approach posited above, the philosophy of law –just like any other philosophical discipline– should refer to philosophical ideas which form the common thread binding regional philosophy to general or transcendental philosophy. These ideas would essentially be of two kinds: epistemological and ontological. Thus, the philosophical method is one and the same (regardless of whether it is practised by jurists or philosophers) and can only consist of this twofold movement which starts from the categorical concepts (or the problems caused by them, which we shall discuss below), analyses them in terms of second-order ideas or concepts, and then returns back to them to offer a new synthesis or re-composition in light of a conception that forges relevant



(inter-categorical) relationships among them. Thus, if these are the two methodological or dialectical moments of philosophical rationality —*regressus* and *progressus*— it is simply because the categorical concepts can be analysed either according to the relationships among each category and the kind of *knowledge* or conceptualisation that fit within them (the kinds of knowledge, studies, sciences, etc.) or according to the relationships among those kinds of knowledge and the categorical *realities* to which they refer (what domain of the world they encompass, what entities they attest to, what connections or laws they determine, what kind of objectivity they allow for, etc.). Put more simply and applied to the matter at hand: legal philosophy devises a map of legal knowledge and realities.

## 4 The law: concept or idea?

- 14 We have said that what justifies the substantiveness of the philosophical perspective is the need that emerges, within the internal conceptualisation of a given category, for a second-order totalisation in terms of omni-comprehensive ideas or schemes that go beyond such a category —critically— and connect it to other categories or concepts. However, the goal is not simply to “apply” this understanding of philosophical rationality to the philosophy of law. This would be the error of a dogmatic (aprioristic or metaphysical) conception of philosophy, as Bobbio correctly pointed out.<sup>12</sup> Instead, the goal is to show how this kind of rationality is, and always has been, present in the philosophy of law itself (just like in any other philosophy) once the philosophical method is being put into practice. Indeed, the presence of the same *method* of rationalising legal phenomena following a two-way path between the categories or concepts of law and certain philosophical ideas has been in constant practice in legal philosophy ever since ancient Greece. Even though in the Natural Law, Kantian and Hegelian traditions, this has tended to be limited to a single idea, i.e. justice, in contrast to the “concept” of law, it is nonetheless unjustified: the repertoire of legal-philosophical ideas is much broader and encompasses all legal-categorical concepts. We could claim that the inner structure of these concepts is already *constituted* by philosophical ideas. Philosophy of law does not “create” the ideas but finds them already operating in law and then proceeds to organise and systematise them “on a second tier”, rather than “apply” them top-down.
- 15 This also makes it possible to grasp the fact that legal philosophy has always been a legally implemented philosophy, i.e., a system of ideas with either a revolutionary or emancipating purpose or a conservative and legitimising purpose with respect to the legal realities in any given period of time. This is a very important aspect of what it means to be a practical philosophy. Both the philosophical methods and the objective ideas with which it works have taken on different meanings in law through the very evolution of legal forms. Philosophy of law has always kept in line with the historical development of legal phenomena. This is how the historical relationships between Roman law and mediaeval *ius commune* or common law and Aristotelian-Scholastic philosophy can be interpreted. Incidentally, Bobbio’s omission of Aristotle is particularly glaring, as he is the source of the very idea of *jurisprudence*, which underlies a significant epistemological understanding of the theory and practice of law common to all Western traditions. Another illustration of this common evolution is the relationship between rational legal philosophy and Enlightenment philosophy with regard to the historical process of State formation, and the positivisation of modern national law. In both



examples we can find jurists' —and not just philosophers'— (natural-law) philosophies. And so we can understand that if the philosophy of law has emerged with this name precisely in the modern period, associated with the conglomerate of doctrines which we call "legal positivism", this is because positive law itself has substantially transmuted its configuration and structure, thus calling for a new theoretical reflection. Thus, paraphrasing Hegel, legal philosophy could be defined as a legal era captured in thinking, that is, in ideas, beginning with the very general conception of law, which should then not be a *concept* but rather a philosophical *idea*.<sup>13</sup>

- 16 If we accept a functional-historical conception of legal philosophy such as the one outlined above —that is, not a metaphysical or dogmatic one— we can see that the organisation of its inherent ideas has to be sought not so much from within (or in the "philosophers'" philosophy) as from the categorical reality which it seeks to analyse, i.e. the law itself. This is a consequence of understanding that the ideas we are discussing exist within the historical and social process (unlike any aprioristical metaphysics), and that they do not belong to an ideal *topos uranos* (nor yet are they mere ideologies associated with groups or classes). Changes in the legal realities are what lead to philosophical ideas which, in turn, allow us to better reconstruct and understand those changes and influence them by means of new ideas. For this reason, before answering the questions of *how* the philosophy is applied to law or *to what purpose*, we must question *why* this application is needed: why the law needs to incorporate any philosophical reflection, whether it comes from jurists or philosophers.
- 17 To develop the thesis suggested in this question, we have to consider two issues. The first is what it means to say that law is a "category". The second is to identify what kind of "critical totalisation" is relevant in this regard in order to yield a true philosophical reflection.
- 18 i) Considering whether law is a category is tantamount to inquiring into the conceptualisation (epistemology) and reality (ontology) of legal phenomena. It would be difficult to find a view of law that denied that this categorical nature is essentially practical, inasmuch as it is an institutionalised social technique. Its "positivity" is associated with this fact (and it is no coincidence that the practical category of law is the first place where this very idea of "positivity" emerged, before "positivism"). Even natural law, as a dualist theory of law, must include the "social thesis" that legal positivism rendered redundant: only what is produced by human practices is (or stops being) "law", with no need for further qualification. The "technical" dimension of law is inseparable from its "artificial" nature as an activity or product of agents who are, not coincidentally, called legal "operators". The categoricity of law is also associated with its normativity. Legal institutions (legislative, judicial, executive) consist of linked practices aimed at continuously producing and applying norms. They are also second-order practices in that legal institutional operations have a social anchor: they assume given practices and norms, and their purpose is to establish a certain order with regard to these practices and norms, interfering in their course by means of operations and decisions. The institutional structure of law is thus situated in a middle ground between moral institutions and political institutions. The legal norms that result from this practical institutional structure are viewed as the ultimate social norms —that is, final or definitive, not of course morally infallible norms.

- 19 ii) If we accept these extremely broad premises, they should yield the key to the notion of “totalisation” to which we have been referring. Atienza (1989: 371–2) boils this idea down to its essence:

The role of the philosophy of law in legal culture as a whole is similar to that performed by law in society overall. The law is said to be a system of social control because it oversees and somehow directs the way social institutions operate; the juridical is not an attribute exclusive to certain social sectors or institutions but rather —once again using C. Nino’s metaphor— it is something that is everywhere, just like air in the physical world. Nor does the philosophy of law have a bounded, exclusive terrain within all legal and social knowledge; its terrain is instead to be found in the relationships among these diverse sectors of culture.

- 20 If legal philosophy is a totalising reflection, it is because law *per se* is a totalising institution, a *pars totalis* of society as a whole which, precisely for this reason, demands recourse to philosophical ideas of a certain kind.
- 21 When asked about the concept of law (*quid ius*), Kant is famous for having said that jurists can only respond tautologically by referring to “what the law is” (*quid iuris*), that is, to “what the laws in a given place and given time say or have said”. This “purely empirical” reference to the categorical nature of law or legal positivity is, Kant alleged, insufficient: “a merely empirical theory that is void of rational principles is, like the wooden head in the fable of Phædrus, fine enough in appearance, but unfortunately has no brain”. By this he was pointing to the need to adopt a philosophical perspective: it is essential to seek a “rational” way that is grounded in the concept of law, “abandoning those empirical principles and searching for their sources in pure reason”.<sup>14</sup> But what I somehow want to explore is the path opposite to the one discussed by Kant. The ideas of legal philosophy should not be sought in any “pure” aprioristic reason but rather in categorical legal practices themselves. When they establish “what the law is” (i.e., what is legally regulated) they are already, by necessity, assuming some *conception* about what the law is (*quid ius*), and these conceptions are precisely those which involve the philosophical ideas that make up the sphere of reflection of legal philosophy. Thus, the goal is to show that the practicality of the legal category is actually not merely empirical and does not entail a mere denotative allusion to “legal practices” or to law as a “social practice” in the sense of a “matter of fact” (as the positivists also often view it), but that it also includes elements of *universality* that lead it to transcend its factual dimension (though without necessarily entering into metaphysics). Such universal elements — which, as we shall see, are simply values— are the necessary components of legal rationality, of the very discourse of law, and they make its concepts characteristically extend beyond the categorical framework from which they emerged.

## 5 *Ubi ius, ibi philosophia*

- 22 What gives conceptualisations of the legal category a philosophical scope is not merely the fact that they contain “totalisations”. Totalisations are common to any category, just as any scientific or technical category entails exercising criticism at some level. As we have already said, the uniquely philosophical form of totalisation appears in a multi-categorical and therefore transcendental context. And this holds true of legal concepts inasmuch as their practical and normative nature implies connection and synthesis among different categories: moral, political, social, economic, etc. The kind of normative totalisation which is characteristic of the legal category brings it to the verge of

philosophy. While this does not mean that the purpose of law is to “solve philosophical problems”, it should nevertheless imply that the practical problems of law cannot be solved without using philosophical ideas and conceptions. Additionally, we should not lose sight of the fact that the very origins of philosophy in Greece were closely tied to discussions of all sorts of problems —logical, moral, political, etc.— closely related to legal categories.<sup>15</sup>

- 23 Yet in addition to this multi-categorical definition, there is a second feature of the legal category that forces its concepts to make “totalisations” without ceasing to be concepts. Because it is institutionalised, the law is a collective practice, an aggregate of extraordinarily complex and highly internal specialised sub-institutions —at least where legislative, executive and judicial functions can be minimally differentiated— which operate according to decisions of diverse subjects through extensive periods of time. This multiple diversity of functional parts means that unity and coherence of purposes within legal practice are only possible if it incorporates specific devices of reflective rationalisation to carry out its functions of producing and applying norms. The law is thus largely a corpus of “doctrine”, that is, normative practice plus theory, connected internally. Its facet as a technique for social control is inseparable from its dimension as reflective, “ideological”, doctrinal technique, which implies a high degree of abstraction in its approach to social agency. Legal practice depends on a complex conceptual and theoretical *instrumentarium* in which we can discern two different genres.<sup>16</sup> The first contains the *formal* doctrines or theories which outline the technical and methodological resources and procedures associated with legal practice as a “formalist” practice, that is, centred on legal norms in their role as “forms” or structures through which it intervenes in social action (primarily rules and principles). These doctrines substantially supply the legal norms with an identification, classification and rank (a theory of the legal “sources”), as well as the results and procedures used to implement them in practice (a theory of method or interpretation). The second genre contains the *material* theories which supply overarching conceptions of the substantive normative *contents*, the purposes and values which the legal system is geared towards achieving via the aforementioned techniques and methods (e.g., a theory of constitutional rights). Both kinds of theories or doctrines, which are eternally intertwined, comprise a legal ontology and epistemology, that is, a working “philosophy of law”. They form what has been called “legal paradigm”, “legal reason”, “legal ideology” or “shared legal consciousness”, which can also be seen as a true “worldly” or “professional” philosophy of law, or a “jurists’ spontaneous philosophy” which encompasses a self-conception of law *ad intra* and a “legal conception of the world”, that is, an *ad extra* interpretation of reality (social, political, economic, natural) stemming from legal rationality as a second-order rationality.
- 24 A third fundamental aspect of these totalisations of legal rationality which decisively brings their format closer to philosophical totalisations is related precisely to this dimension of second-order normativity. I am referring to the fact that it has a *dialectical* constituent nature; that is, it is structurally associated with conflict, deviation, incompatibility, contradiction, incommensurability and controversy. Therefore, its rationality essentially consists of deploying strategies aimed at using discourse and argumentation to manage and disentangle these conflicts and incommensurabilities. This is obviously related to the fact that the law as a social institution is primarily charged with being “the last resort” (*ultima ratio*) and has a coercive monopoly on conflict

resolution and the enlisting of cooperation and coordination on a collective scale. However, precisely because of this, its norms and decisions are the outcome of a “syntax” or composition of essential plural or heterogeneous parts or elements which are in constant conflict and imbalance. There is no need to belabour the fact that this is also true of both producing laws (legislative, constitutional) and applying them (judicial, administrative). The logical construction of kinds or types of action and the individualisation and specification of the particular practical situations arising from them are a form of totalisation, and the same holds true of the finalistic reasoning (composition of interests and objectives) and balancing deliberation (composition of values) from which legal norms and decisions result. In both cases, the practical problems that are addressed by the law are therefore very similar to philosophical problems. They both entail conflicts whose very nature somehow compromises or puts in question the entire category and exceeds it “from the inside out”. The most common manifestation of this goes beyond the fact that each legislative or judicial decision entails a holistic *regressus* to the entire “legal system” as a whole (Dworkin’s “integrity” for instance). Furthermore, this systematisation cannot merely be logical or formal. The legal system is not a “logical system” but a “practical system”, one that is doctrinal, prudential or justificatory (although, of course, its justifications cannot avoid logic). And this means that rather than being a “closed” category by application of its very internal conceptual and theoretical methodology (as would be the case if it were a scientific category), it is a methodology that presupposes the essentially “open” nature of legal practice. In other words, its “closure” can only occur by incorporating elements from other categories. Given that the law is a second-order system, these elements cannot be anything other than the overarching purposes and values that the legal system strives to materialise in the first-order social practices, purposes and values that the law itself does not create but rather recreates and shapes in practical terms. Thus, we are dealing with the incorporated contents which we called “material theories” above, substantive conceptions that are necessarily political-moral (and therefore “philosophical” in the sense noted) and which legal practice necessarily merges with.

## 6 Legal philosophy as practical philosophy

- 25 If legal rationality is presented this way, as “philosophical” conceptions that are an internal, necessary part of law itself as a doctrinal system, then law should have its own “genitive” philosophy of law. Theoretical conceptions usually considered to belong to *academic* philosophy of law (legal positivism, formalism, natural law, constitutionalism, realism, etc.) also shape jurists’ own “professional philosophy” in itself; this is particularly visible in the more abstract doctrinal strata of legal practice, which are also the most far-reaching (such as constitutional courts). Therefore, the point of contact between legal philosophy as a discipline and law itself is to be found here: philosophical conceptions of law are an internal part of its practice, and the theories that shape legal practice partly overlap with the philosophy of law.
- 26 Legal philosophy in the strict or academic sense could then be defined as any formally philosophical reflection aimed at systematising ideas which already have some level of reflective categorical development within law. Here is where, as mentioned above, we must considerably adjust Bobbio’s general assessment of the contrast between jurists’ and philosophers’ legal philosophy. This contrast distorts the fact that *any* philosophy of law,

no matter whose it is, has always consisted in applying more or less systematic philosophical schemes to law (and it is impossible to see how it could be otherwise). On the one hand, Bobbio does not pay enough attention to the fact that law is a historical-cultural institution which poses general philosophical problems for *any* philosophy. As such, law has always been present in the ideas coined by the great general philosophers in the Western tradition, a part of which, since Aristotle, has been known as “practical philosophy” (*politiké*), which encompasses moral or ethical philosophy, political philosophy and social philosophy in general. Suffice it to mention the very idea of “law” (*lex*), the practical use of which is the outcome of the synthesis of different categorical conceptions: moral, scientific, legal. The “persistent questions” (Hart) raised by law are general philosophical problems, such as its origin and its relationship with the ideas of normativity, power, society, justice, morality or scientific truth. On the other hand, the *general* preference for jurists’ philosophy of law is unjustified. Because of their training, jurists are best poised to undertake a philosophical reflection based directly on legal categories (which is imposed on them by their own methodology), and this explains why academic legal philosophy has primarily been cultivated by “jurist-philosophers”. However, this in no way guarantees complete immunity from metaphysics or dogmatism. In any historical period, jurists have appropriated general philosophies when devising their doctrines (indeed, the very category of legal has always needed a covering of philosophy with which to build its internal meta-theory). It could be claimed that not a single philosophical doctrine has failed to receive an incorporation or adaptation from the field of law (Thomism, Kantism, Marxism, Hegelianism, pragmatism, phenomenology, neo-empiricism, analytical-linguistic philosophy, hermeneutics, discourse theory, post-modernism and any other philosophical “-ism”). The examples of “applied” philosophy that Bobbio censures are *also* the work of jurists, and not just of philosophers who “speculatively” descend to the field of law. This proves that the “application” of philosophical systems itself does not deserve the aprioristic label of metaphysical or dogmatic—but rather those specifically applied theses, concepts, and methods.<sup>17</sup>

- 27 Instead, what the history of legal philosophy shows us is a *continuum* of ideas which all converge in law and are modulated differently (but not in a mutually exclusive way) by general historical philosophical systems and by the academic philosophy of the law as a discipline embedded in the law. Jurists’ philosophical conceptions, which are, as we have seen, internal totalisations of the very category of law required by the kinds of problems dealt with by the practice of law, are where the two intersect. These conceptions are unquestionably the best available philosophical entryway into the law, in that they supply the basic repertoire of legal-philosophical ideas and, in this sense, must be capable of being incorporated by *any* philosophy of law that does not seek to be metaphysical or disconnected from legal experience. Yet they must also be the target of criticism and reframing in general or transcendental philosophical terms, rather than being viewed as inherent to a purely endo-legal or intra-categorical discourse. And that criticism means that legal philosophy must necessarily interweave with moral philosophy and political philosophy; that is, it must be constructed within the framework of some practical general conception of philosophy viewed in a transcendental perspective. Below we shall very schematically examine some of the main arguments upholding this claim.
- 28 The core argument leads us to once again consider the kind of totalisations that characterise the legal category and are expressed in its internal conceptions. They are essentially *justificative* totalisations. Given that the law is a practical, normative category,

legal concepts are *doctrinal* concepts. Their main purpose as practical concepts is not only to guide action (the “technical” aspect), but to do so in a justifiable fashion. Legal concepts are linked to the practice of arguing and providing reasons in regard to legal decisions, of justifying action (*ex post* and *ex ante*). This means that what we have called the ideas that shape legal practice until now, are actually “ideals”<sup>18</sup> or, in Kantian terms, “regulative ideas”.<sup>19</sup> That is, they are *values*.

- 29 Values are the true *transcendental* building blocks of legal practice. This could be asserted after examining any inventory of the fundamental legal concepts, such as “person”, “action”, “rule”, “illicit”, “sanction”, “responsibility”, “right”, “duty”, etc., which represent a categorisation of the basic notions of practical philosophy (the traditional *philosophia practica universalis*). Dealing with these essentially justificatory concepts in legal practice is what makes it necessary to draw from conceptions (which we called “materials” above) that are capable of supplying versions or interpretations of them in terms of conglomerates of foundational value judgements. These evaluations are at the very core of the legal method, which actually starts with the assumption of the “openness” or “indeterminacy” of the legal system and the need to “close” it or determine its content by referring to practical justifications of this kind.<sup>20</sup> Legal concepts are always *elisions* of value judgements.<sup>21</sup> The entire technical-practical complex of the law —primarily made up of rules as elemental instrumental units of the jurist’s work— is the outcome of deliberations and balances between values, and thus the practical application of the concepts captured in them is inseparably linked to the underlying value judgements and the need to rationally ground them in objective validity. The disagreements which lie at the origin of rules —as “expressions of compromises, of judgements about the outcome of conflicts”<sup>22</sup>— are constantly reproduced in their process of application, so that determining the “grounds of law” in each new case requires making explicit the values at stake, and ultimately their ethical-political foundations. Hence, it is essential to gain some conception of the *principles* (which are the normative expression of values) and to *wholesale* reconstruct the law involved in the resolution of each case in legal practice, even if this may only seem particularly visible in difficult cases or in legal issues that typically spark moral disagreements (abortion, euthanasia, gay marriage, surrogate motherhood, etc.). All legal issues, including easy cases, are questions of principle in this sense, that is, questions of value.<sup>23</sup>
- 30 It is therefore necessary, in Atienza’s words, “to resort to a moral and political philosophy that allows some order to be articulated or established among the different kinds of justifying reasons that converge in law”.<sup>24</sup> This philosophy encompasses combinations of ideas on the common good, the general interest, human rights, collective goals or purposes, etc. and is ultimately resolved in some kind of foundation of the basic ethical and moral values (freedom, equality, dignity) and the political values which justify power and authority (a conception of democracy, of the rule of law, etc.). That is, it is resolved in what, we have called since Aristotle,<sup>25</sup> *justice* as a basic schema to articulate ideas around what is good and right in distribution and reparation in both the public and private matters that make up the *territorium* of human praxis. In this way, the justificative dimension of law connects it *internally*, from its own practice, to philosophical-moral and philosophical-political conceptions. It leads to general or omni-comprehensive systems of practical philosophy (with an orientation that can be liberal, utilitarian, communitarian, deontological, social, etc.) from which, in turn, the orientation and *normative* critique of those legal conceptions take place. These normative functions essentially correspond to



the academic philosophy of law, the natural middle ground between law and practical philosophy, which is then shown to be a practical undertaking. The philosophy of law is a practical philosophy that follows the law, like its shadow. The values it encompasses, as both transcendental underpinnings and ideas from practical philosophy simultaneously, serve as a bridge, allowing a back and forth movement between the two.

- 31 We could even claim that legal philosophy is that region (or “part”) of practical philosophy that enjoys a certain “primacy” over the others. After all, law is not only a place where political-moral values are realised and embodied (a decisively effective embodiment due to the fact that legal institutionalisation manages public coercion) and where these values thus gain a *definitive* justification, but also the place where moral philosophy and political philosophy converge on equal terms from their own transcendental perspectives. Indeed, legal-practical institutions appear to be their necessary landing place. They can play the role of a historical-cultural mesh necessary to make morality and political society possible, without which their values would simply disintegrate. Law represents not only a society’s ideological self-description but also its own political and moral self-justification, where all practical values are ultimately “personified”, that is, attributed to the community as a *whole* (a clear form of “totalisation”). Law is thus associated with the very idea of “public reason”.<sup>26</sup> This is a thread running throughout the history of practical philosophy from Aristotle to Kant, just to cite its two touchstones.
- 32 We can thus understand the profound sense in which the genuinely philosophical perspective on law can be viewed as teamed with the notion of “critical totalisation”. It essentially has to do with the justificative purpose of law, which operates on the basis of practical values. The point is not only the *prevalence* of this justificative dimension of law over its technical or directive dimension, since the problems it deals with encompass conflicts and disagreements that are ultimately axiological and need to be resolved on equal terms. Nor should the practice of law be governed by a method that seeks to constantly construct and reconstruct the coherence or “integrity” of legal matters. Justifying (the legal method) would then appear as a complex interpretative action that effectively entails “totalising” every case by virtue of multiple criteria (relevance, description, applicability, truth, appropriateness, weighing, etc.) in order to integrate it into the legal system “as a whole” (Dworkin 1986: 400-1, 411), somehow recapitulating the entire set of technical instruments of positive law in each decision. The point is also, and above all, that this requires *going beyond* the legal category to reveal law as a *precisely political-moral technique*. Legal technique as a whole and each of the decisions made within it throughout its constant development (in this second reflective level on social practices) must appear as a justified practice that serves the values of justice and morality. “Inclusive” integrity, in turn, refers back to a “pure”,<sup>27</sup> aspirational integrity on whose terms law as an institution that realises values is justified; yet also, and more importantly, it is *criticised* if it does not.
- 33 And this is the reason why the problem of unjust law, of the *validity* of legal norms and decisions, is a *transcendental* problem that calls the whole legal category into question and labels some particular decisions as “flawed” or burdened by shortcomings (axiological and *therefore* legal) when they are inevitably shown to be unjust after all. This aspect is recognised in *topoi* like Antigone, Augustine’s *magna latrocinia* and “Radbruch’s formula”, which manifest the pretension for law to be correct (Alexy) or claim that it is a practical system that seeks moral authority (Raz). The essentially totalising and conflicting nature



of the practical values involved in the legal institution —the values of justice or, more accurately, the demands of injustice<sup>28</sup>— are what make the concept of law draw from philosophy, and what makes legal philosophy a *practical* philosophy.

34 Justificative legal rationality thus rests upon a constant practical effort to connect or combine *partes extra partes* with respect to law. This practical process, far from reflecting a “pre-established harmony”, is essentially “open”, asymmetrical and controversial, which results both from the fact that legal practices must constantly adjust to the flow of first-degree social practices and from its own independent institutional logic as “technical” device. Parts of law interfere with parts of morality and with parts of politics in different ways, at different levels, and not always (if ever) harmoniously.<sup>29</sup> But the tensions among them must nonetheless be recomposed in a unifying justification in the guise of ultimate totalisations of the values involved. This includes the tensions that exist between the efficacy of power or authority and substantive validity; between justice and legal security; between *dura lex, sed lex* and *summum ius, summa iniuria*; between the political limits of law and the aspirations of universal rights; between the sociocultural, idiosyncratic uniqueness of each legal community and the demands of universal critical morality; between the institutional values of legal technique (associated with the continuity of past operations, formal equality, specific interpretative patterns, etc.) and the substantive values of justice; between the very principles of justice that law encompasses and their necessary stabilisation through rules; between the rationality that governs the legal system and the inevitable presence of irrational decisions in its implementation. Only through different conceptions of the internal values of legal practice (as part of the different conceptions of law) can we reach any kind of single articulation of this essentially conflictive terrain which is capable of forging “overlapping consensus”, “reflective balances”, criteria of “reasonability”, “balancing” or “proportionality”, “incompletely theorised agreements”, etc. This is the result of interpretations that entail questioning the legal category as a whole in light of values, while it also leads to the restoration of the unity of practical reason around these values. This need to evaluatively interpret the legal category in terms of totality based on the entire practical realm explains that the doctrinal concept of law has epistemological priority over all other concepts (sociological, economic, logical, etc.).<sup>30</sup> It also determines that the concept of law is an “essentially contested concept” or an “interpretative concept”, that is, a philosophical concept, an *idea*. And ultimately, this is also the reason there must be an uninterrupted, substantial continuity between the two.

35 Now the sense of the thesis that legal philosophy cannot be understood as an *adjectival* or *genitive* philosophy may finally be clearer, too. This would precisely be a philosophy in which the values that concern law are not considered as transcendental. That is, they are viewed either as values purely *external* to legal rationality (belonging to moral or political philosophy but not to legal philosophy) or as values that are purely *internal* to the legal institution (not connected to morality and politics, that is, not transcendental). A clear formulation of both ideas can be found in Kelsen, when he states that “given that justice is a postulate of the moral, the philosophy of law is a branch of moral or ethical philosophy”. In other words, as long as it is concerned with values, philosophy of law would no longer refer to law. Thus, the key discipline regarding law is not a “legal philosophy” but a *scientific* “general theory of law” the purpose of which is descriptive, not normative. According to Kelsen, “the subject matter of this theory is the law as it actually is, that is, positive law, both national and international”, and its purpose, in turn,

“consists of analysing the structure of positive law and setting the fundamental notions in the knowledge of this law”.<sup>31</sup> This idea is what has prevailed in the core currents of contemporary legal positivism, in its zealous attempt to separate what law is from what it should be, of isolating “conceptual issues” from “normative issues”. Hart even considers this the nuclear positivist thesis.<sup>32</sup> Indeed, legal positivism is the most emblematic (though not the only) embodiment of the viewpoint that assumes that the substantive values of law are segregate from the field of legal philosophy or that reduces them to strictly internal values (technical or categorical: primarily the formal or institutional values of law). Both assumptions entail the liquidation of the philosophy of law, the former because it would not be properly a *legal* philosophy but a moral or political philosophy, and the latter because its study would no longer be philosophical but rather scientific (or technical), as legal concepts could be reconstructed, it is said, away from any justificative value judgement.<sup>33</sup>

- 36 Thus, Ferrajoli, for example, tells us that referring to the values of justice would mean adopting an external point of view in relation to law: “the point of view of the political, which views positive law and the legal institutions of the diverse legal orders as a historical, political or social product which must be constructed (or demolished), defended (or criticised) and conserved (or transformed)”. This external standpoint, according to Ferrajoli, “assumes the values that design and project the external, ethical-political ought of law and that allow formulate judgments on the greater or lesser degree of justice (or injustice) of the law”. Now, “legal theory is situated on a completely different level, as a formal theory limited to analysing technical-legal concepts and their syntactic relationships”. This theory is “formal” or structural, essentially logical or scientific in nature, a “meta-theory” of legal concepts that takes them as “ideologically neutral, that is, independent of any value system internal or external to the legal systems studied”.<sup>34</sup> Therefore, the theory of law seeks to be the true discipline that replaces legal philosophy scientifically –categorically.
- 37 Expressed in other words but with the same outcome, legal philosophy is, according to Guastini, just a “philosophy of jurisprudence”, a “merely conceptual” analysis of jurists’ discourse, the purpose of which is “to model the concepts which can describe the law”, but not to model the law itself, “in no way influencing the identification of the content of law itself, which, by hypothesis, is not in dispute when debating in philosophy of law”.<sup>35</sup> In sum, the values of law are only identified as *attributed* social facts, not as values whose recognition entails a practical compromise which turns any discourse on them into a *normative* discourse and, in particular, the discourse of legal philosophy.<sup>36</sup> This compromise would involve no more than *epistemic* values, excluding substantive ones; the goal would simply be to describe evaluations, those which are present in the justification of law, without this then requiring a justificatory or normative theory. The values that make law a normative and justificative institution are only *transferred* theoretical or epistemological values, but not necessarily practical values (either shared or rejected).<sup>37</sup> Legal philosophy is not normative or practical in a strong justificatory sense, but a theoretical (“conceptual” or exempt from normativity) undertaking.
- 38 It seems obvious, however, that philosophical criticism on this standpoint can only be made in epistemological and ontological terms, as mentioned above. On the one hand, this criticism must show that the philosophical attempt of conceptually reconstructing legal validity as stripped of value is based on an erroneous understanding of the *epistemology* of the legal-normative discourse and its conditions of scientific validity. The

legal category is not scientific precisely because legal concepts —the concepts of legal dogmatics, of the “general theory of law” and its successor, legal theory viewed as “science”— are structurally evaluative and grounded upon stances that are irremediably moral and political. Therefore, there is no legal science capable of epistemically (“theoretically”) distancing or freeing itself from the practical compromise with the substantive values of law. Any metalinguistic or metatheoretical discourse that deals with the legal concepts in which these values are captured performs functions internally to the object language of legal practice as it belongs to the grammar of this praxis. These are functions of legitimation or criticism that make it more a meta-language of law (i.e., internally generated from the internal or participant point of view in order to conceptually “close” the legal category) than *about* law. But neither the technical nor the scientific (doctrinal) legal concepts manage to render the legal category “closed” or self-referential; on the contrary, their practical dimension determines that legal normativity has a permanently open structure<sup>38</sup> and necessarily refers to other moral and political categories or notions. The fact that the legal category is not strictly scientific or technical but rather a doctrinal practice in no way diminishes its rationality; it only means that it is a practical, political-moral kind of rationality whose concepts can only be articulated and “closed” in a unitary way by making use of philosophical ideas dealing with political-moral values. Is such an evaluatively committed character of legal rationality what determines then that, despite its categoricity, it is neither scientific nor can it be *qua tale* scientifically reconstructed.

39 Thus, the “pragmatics” of legal theory, Ferrajoli tells us, is about the very *principles* of law (that is, its values) viewed as the “logic” guiding it, but as *iuris tantum* and not *iuris et de iure* principles, given that the nomodynamic structure of law, subjected to divergences and historical contingencies, will not always make it possible for them to be satisfied.<sup>39</sup> This is simply another way of saying that law is a practical undertaking whose purpose is to totalise these values, which remain in conflict *inside and outside* the legal category and should therefore not solely be viewed as epistemic (logical), purely descriptive and analytical, that is, *theoretical* values. They involve practical engagement in substantive conceptions of justice articulated through different combinations and specifications of those principles. Only in this way do they allow for the ethical-political criticism of established law, a kind of criticism that is then both internal and external, that is, transcendental or philosophical. The pragmatics of legal theory is yet another dimension of legal practice: legal theory is not a *theoretical* discipline according to any minimally rigorous definition of the term,<sup>40</sup> and this is the fundamental meaning behind the statement that legal philosophy is a practical philosophy. The set of epistemological ideas upon which legal philosophy critically examines legal rationality in argumentative terms —ideas such as “interpretation”, “correction”, “logic”, “argument”, “truth”, “objectivity”— reveals the primacy of the justificatory dimension of legal praxis and its internal connection to moral and political value judgments.<sup>41</sup>

40 On the other hand, the *ontological* consequences of what has been said so far can only point to the fact that the “reality” of the law is a practical undertaking anchored in a political or institutional system of authority, which simultaneously tries to seek moral validity or justification. This means that it supplies reasons whose scope necessarily goes beyond the contingency of any social “fact” or source, any convention or ideology, and links up with values that should be viewed as objective, historical-culturally developed *ideas*, which any kind of legal discourse has to engage in by incorporating a claim to

practical correctness. These ideas (which are primarily the ideals of justice and rationality that constitute legal argumentative practice, themselves at the root of the philosophical dialectic of classical Greece) show that what law “should be” can thus not be uprooted from its reality or being, but is rather internal to it, as are the conceptions about it operating within legal rationality. This not only renders philosophically inconsistent any axiological scepticism or radical criticism which strives to deny the objectivity or validity of the evaluative reasons of law by reducing values to facts (e.g. to ideologies, social conventions or mere disguises of the strategic mechanisms of power); it also makes legal positivism itself particularly self-destructive and blind to the true practical nature of law, in that it strives to be compatible (like “ethical positivism”) with any kind of moral objectivism.<sup>42</sup> After all, the thesis of the separation or segregation of law from moral values would itself be a normative or moral thesis that rests upon what it is trying to deny: the fact that moral values are not only present but constitutive of the concept of law. They could no longer be seen as merely “conceptual”, in the sense of “epistemic” or “attributed” values, but instead as *substantive* practical values. This entails a normative conception of legal theory and therefore an understanding of this as practical philosophy.

- 41 Hence, finally, the discourse of legal values —legal axiology— cannot be viewed as a *third* discourse or a part of the philosophy of law independent from the discourse on the concept of law (legal ontology) or its forms of knowledge (legal epistemology), as it is commonly viewed. This would be nothing other than an inherited prejudice from the positivistic view of law, and not only a prejudice but also a hindrance. The conception that is most coherent with the true position that law occupies within the political-moral space —precisely because values are so central to it—, that is, the post-positivistic conception which we call constitutionalism or the argumentative view of law, means transcending this methodical view of free-value positivism and instead envisioning the philosophy of law as a practical philosophy integrated in moral and political philosophy. The universality of the concept or knowledge of law (and therefore, the universality of legal philosophy) cannot be encapsulated within a single categorical enclosure, as if it were a “natural”, “criterial” or “semantic” (that is, scientific) concept. The idea of constructing a universal concept of law has been present in the history of legal philosophy since ancient times (from the Greek *koinos nomos* and the Roman *ius gentium* to mediaeval natural law and modern rational law or the positivistic “general theory of law”), but it has always been a truly *philosophical* project. The concept of law is an “interpretative concept” constructed upon ideas and conceptions of a philosophical nature which are present in legal practice and in the doctrinal concepts of law methodologically linked to its internal justificative point of view —to jurist’s *prudentia iuris*.<sup>43</sup> What is truly universal in law should thus be values themselves understood as ideas that seek to be transcendental and from which it is possible to overtake (critically totalise) the contingent or particularist historical anchor of such justificative practice. The categoricity of legal institutions and norms is contextual, always fragmented into idiographic and idiorhythmic regional circles (national states, legal families, cultural traditions, etc.), because norms can be abstract objects but also individuals in the logical sense. Only values would be susceptible to true universalisation, as they play their justificatory role in objective terms and so become the genuine ideas that make legal practice a rational, universalisable practice. Law will lose what actually makes it rational if these ideas cease to be present. And inasmuch as legal philosophy strives to do without

them, to present itself as more “technical” or more “scientific”, it will put at risk its own claim to universality, which belongs not to a theoretical but a practical philosophy.

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## NOTES

1. Atienza (1989: 371); see also Díaz (1992: 334, 369).
2. Bueno (1970; 1999).
3. However, “transcendentality” would then have not an aprioristic or metaphysical meaning (as it does in Kant) but a meaning relative to a *posteriori* recurrence of practical human rationality (Bueno 1970; 1999). A similar perspective can be found in Nagel 2000.
4. “What is there to be said about the ‘nature’ of legal phenomena beyond that which emerges from the doctrinal study of law, which has these very phenomena as its subject?” (Ross 1959: 6).
5. “It is understood that the preference for the works of jurists who raise themselves to philosophy more than for those of them who lower themselves to the world of law reveals the preference for one method or, more accurately, for a certain working style which is easier to find in the work of the former than the latter: What characterises this working style is the primacy attached to analysis over synthesis, a primacy grounded upon the conviction that even though analysis and synthesis are necessary steps in all inquiry, analysis without synthesis (which is what philosopher-jurists are often blamed for) is preferable to synthesis without analysis (which is a common vice among jurist-philosophers), because the former at least seeks good materials to construct, and because the latter only builds houses of sand where no one wants to live.” (Bobbio 1990a: 96).
6. Bobbio’s core argument is that even though it may be more analytical than synthetic and have philosophical aspirations that are not rigorously systematic, jurists’ philosophy of law is a reflection developed from empirical, positivistic materials precisely because it comes from jurists who are working “grounded” in law, whereas philosophers’ philosophy of law is an eminently dogmatic, aprioristic philosophy (*ancilla philosophiae*), an “applied philosophy” of systems and doctrines extrinsic to the field of law in which the general problems of law are studied not by dealing with legal experience but from those prior systems, thus giving rise to speculative and reductionist constructs, which fully justifies jurists’ traditional mistrust of philosophy.
7. The expressions are drawn from Cotterrell 2014.
8. Judging from the names he mentions (Hobbes, Ihering, Géný, Ehrlich, Kelsen, Kantorowicz, Ross, Hart), we can glean that Bobbio’s jurists’ philosophy is primarily affiliated with legal positivism, while as prototypes of the philosophers’ philosophy he cites Thomism or Hegelianism. As is well known, Bobbio was also very influenced by logical positivism in his understanding of the relations between science and philosophy. Otherwise, his direct adversary in this 1962 paper —and this explains its polemical, antimetaphysical purposes— is the Italian idealist-Hegelian legal philosopher Giovanni Gentile, “an extreme example of philosophical radicalization and hipostatization” (Bobbio 1990a: 96).
9. A similar three-way division can be found in Oakeshott 2007 when he talks about legal philosophy as an “applied philosophy”, as an “*a priori* natural law” and as a “philosophy of jurisprudence”. They stand in opposition to genuine “philosophical jurisprudence”.
10. Some people have even dismissed positivistic legal philosophy with an analytical orientation as “scholastic” (Dworkin 2006: 213) or have condemned its distance from the practical interests of jurisprudence (Cotterrell 2014; Postema 2015). These are the same disparaging attributes of which Bobbio accuses “philosophers” philosophy of law.
11. Kant (1798) 1968b: 28.
12. By “dogmatic philosophy” I mean any kind that envisions itself not as a reflective, secondary knowledge but as an original, radical or first-order one, a kind of substantive, previous



knowledge that does not draw from sources outside itself but instead is “applied” top-down, as a system of “truths”, on contents or matters that in themselves are merely subsequent and secondary (a “general function” that is realised or verified *ex post* in “monotonous” variables). Dogmatic philosophy is any purely academicist or professorial philosophy that presents itself as a closed, finished doctrine and claims to be founded upon timeless or ahistorical principles; it is not *embedded* within the historical, practical and scientific present but instead consists of fundamental truths which are *exempt* from categorical realities, situated above or apart from them like a *philosophia perennis*.

13. This can be seen, for example, in Raz’s distinction between the “concept” and the “nature” of law (Raz 1995: 195ff.; 2009: 17ff., 91ff.).

14. Kant (1797) 1968: 229-230 (“Einleitung in die Rechtslehre”, § B).

15. The formation of classical philosophy is closely linked to the discussion against sophists and orators around the concept of law (*nomos*) and the ideals of justice (*dike*, *dikaiosyne*, *to dikaion*). From here not only arises the logic, the dialectic and the rhetoric, within the context of the *polis* democracy based on the discursive technique of *logos* as public reason (*isegoria*, *isonomia*), but the entire political and ethical philosophy of Plato and Aristotle. See e.g. Jaeger 1946: 99ff.; 1982. This makes practical philosophy the true “first philosophy” (Baracchi 2008). But it is also deeply connected to the second main source of philosophy —the emergence of scientific, universal knowledge with mathematics—, since the geometrical conception of *cosmos* pursues, in Vernant’s words, a “rationalization of political relations” that seeks “less to put the city in harmony with the sacred order of the universe than to achieve precise political purposes” (Vernant 1985: 193ss., 356). A similar combination of practical philosophy and scientific rationalism will repeat itself again in Modern Age and Enlightenment philosophy within the context of the modern state.

16. Cf. Viehweg 1991: 35, 44ff.

17. Thus Bobbio himself assumes this when he ends his paper by redirecting the opposition between philosophers’ and jurists’ legal philosophy to a last philosophical choice (“a difference between two modes of philosophizing”) between monism vs. pluralism and rationalism vs. empiricism (Bobbio 1990a: 98), being the jurists more inclined towards the second option within these dichotomies —that is, as said, giving priority to analysis over synthesis. It should be noted, however, that for Bobbio this does not necessarily imply a sharp analytical fragmentation of legal philosophy in the specialized subdisciplines he distinguishes (legal theory, theory of legal science and theory of justice). For in the last paragraph of his paper he states that a “unitary discipline” would be the best way for legal philosophy to play its practical, critical role (a role pretty close, indeed, to a “critical totalisation”): “The task of the philosophy of law, from the didactic point of view, is to break the dikes that keep the traditional legal disciplines in the artificial reservoir of a positive system. This objective can be better fulfilled by mining the dam on several sides at a time” (Bobbio 1990a: 99).

18. Pound 2002: 30ff., *passim*.

19. It is common knowledge that in relation to concepts, Kant’s ideas of practical reason have a constitutive or “categorical” use, not a regulative use with the purpose of providing them with unity or totality.

20. Alexy 2005: 45ff.

21. Waldron 1994: 527ff.

22. Raz 1990: 187.

23. Dworkin 2006: 35.

24. Atienza 2013: 284.

25. Aristotle, *Nicomachean Ethics*: V.

26. Rawls 1993: 212ff.

27. Dworkin 1986: 404ff.

28. Sen 2009.

29. Nino 1994.
  30. On the “logical primacy of the internal point of view of human practice”, see Nino 1994: 37, 47.
  31. Kelsen 1962: 131.
  32. Hart 1987: 37ff.
  33. See a clear and early formulation of both theses in Bobbio 1990b. The general theory of law is factual, formal, scientific, non-philosophical and deals exclusively with the concept of law, whereas the philosophy of law is evaluative, material and confined to the idea of justice as a matter of value and ideological stance. “Filosofia del diritto nel senso proprio è solo la teoria della giustizia” (Bobbio 1950: 96).
  34. Ferrajoli 2008: 28ff., 45, 49ff.
  35. Guastini 2011: 7ff., 9.
  36. Raz 1995: 235ff.
  37. Marmor 2011: 129ff.
  38. This is a philosophically recognised idea from Aristotle’s *epieikeia* to Hart’s *open texture*.
  39. Ferrajoli 2008: 57ff.
  40. Postema 1998.
  41. On the priority of the material (that is, practical) conception of legal argumentation over the formal (logic) and pragmatic (dialectical and rhetorical), see Atienza 2013.
  42. Waldron 2001.
  43. Dworkin is far and away the legal philosopher who has best captured this point, when he claims that constitutional judges make philosophical decisions, not only occasionally before a particular hard case (i.e., a case that questions the foundations), but as a matter of routine, given that the concepts they use in their decisions (“responsibility, meaning, intention, equality, freedom and democracy, for instance”) are “hard concepts” (i.e. ideas) that require deploying an argumentative or reflective practice on some of the deeper issues of political morality (Dworkin 2010: 22, 29, 33).
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## ABSTRACTS

My purpose in this paper is to make a case for the strictly philosophical nature of our discipline, legal philosophy. I first take a prior stance on the issue of what philosophy is in general and outline some premises for the definition of philosophical rationality. This then leads me to critically examine Bobbio’s dichotomy between jurists’ legal philosophy and philosophers’ legal philosophy. It is essential to reformulate the relationships between legal philosophy as a “special” or “regional” discipline as opposed to “general” philosophy. So thirdly, I re-examine this problem using the distinction between concepts of law and ideas in law. Fourthly, I defend the thesis that, when ascertaining the type of philosophy the philosophy of law is, the most decisive factor is not so much (or not only) the relationship between philosophy of law and philosophy in general as, more importantly, the relationship between it and law itself. I argue that the nature of law itself makes its practice inevitably and ineluctably associated with philosophical ideas and conceptions. This practical view of law is tightly bound with a view of legal philosophy as a practical philosophy, and this is the main thesis I shall defend here. Different expressions of this practical view of law can be found in prominent contemporary

authors who go beyond the dichotomy of legal positivism-natural law (such as Nino, Alexy, Dworkin, Atienza). The essential feature which I regard ties philosophy of law to the condition of some “practical philosophy” is the role played by the concept of value, i.e. the centrality and pre-eminence of its evaluative dimension.

## INDEX

**Keywords:** legal philosophy, jurisprudence, practical philosophy, legal positivism, legal theory, legal post-positivism

## AUTHOR

**JESÚS VEGA**

Universidad de Alicante (Spain)

**E-mail:** [jesus.vega@ua.es](mailto:jesus.vega@ua.es)